

230806

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 35536**

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**LOUISVILLE & INDIANA RAILROAD  
PETITION FOR DECLARATORY ORDER**

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ENTERED  
Office of Proceedings

AUG 12 2011

Part of  
Public Record

**CITY OF JEFFERSONVILLE'S RESPONSE TO  
PETITION FOR DECLARATORY ORDER**

The City of Jeffersonville, by counsel, hereby tenders its Response to Louisville & Indiana Railroad's Petition for Declaratory Order. This tendered Response to Louisville & Indiana Railroad's Petition for Declaratory Order is attached as Exhibit 1 to the City of Jeffersonville's Petition to Intervene. The City of Jeffersonville respectfully requests that should the Surface Transportation Board grant its Petition to Intervene, that this Response to Louisville & Indiana Railroad's Petition for Declaratory Order be filed as of the date that its Petition to Intervene is granted.

**PROCEDURAL BACKGROUND**

On March 5, 2010, the City of Jeffersonville ("City") petitioned the Rail Office of the Indiana Department of Transportation ("INDOT"), pursuant to Indiana Code Section 8-6-1-7 and 105 Indiana Administrative Code Section 5-10-1, for approval of the establishment of a grade crossing at the junction of a proposed new road and railway tracks over a railroad line operated by Louisville & Indiana Railroad ("City's Grade Crossing Petition"). As proposed, the new road would intersect railway tracks operated by Louisville & Indiana Railroad ("L&I") in Jeffersonville, Clark County, Indiana and would require the installation of an at-grade crossing (the "Grade Crossing"). The

construction is intended to establish a north-south route through an area of Jeffersonville that currently has no effective north-south transportation corridor (the "Main Street Extension"). (Aug. 11, 2011 Lanz Aff., ¶ 14, attached hereto as Ex. A).

On or about May 5, 2010, INDOT notified the parties to the City's Grade Crossing Petition of an on-site meeting at the location of the proposed Grade Crossing to be conducted on May 18, 2010. The on-site meeting was attended by INDOT, the City, and L&I, and on January 18, 2011, the Rail Office issued an Order approving the City's Grade Crossing Petition. (Jan. 18, 2011 Rail Office Order, attached hereto as Ex. B).

Thereafter, on February 4, 2011, L&I filed a Petition for Review and Petition for Stay of Effectiveness. After considering Position Statements submitted by both parties at the request of the Rail Office, the Rail Office issued an Order on June 24, 2011, affirming its January 18, 2011 Order approving the City's Grade Crossing Petition. (June 24, 2011 Rail Office Order, attached hereto as Ex. C). The June 24, 2011 Order specifically provides:

The Respondent has submitted a conceptual alternative proposal but provides no engineering basis for the alternative alignment. The Rail Office cannot determine if it will meet design or build specifications required by standards. The Respondent states the potential of a trans-load facility at the proposed crossing location but does not substantiate the proposal with plans, schedule or funding sources for such.

(June 24, 2011 Rail Office Order, Ex. C).

On July 15, 2011, L&I again filed a Petition for Review and Petition for Stay of the January 18, 2011 and June 24, 2011 Rail Office Orders. INDOT has appointed an Administrative Law Judge for the administrative proceeding, but no substantive orders have been issued in that proceeding. A hearing on L&I's request for a stay will be held on September 21, 2011 in Indianapolis, Indiana.

L&I filed the instant Petition for Declaratory Order with the Surface Transportation Board ("Board") on July 20, 2011, arguing that INDOT's approval of the Grade Crossing is preempted by the Interstate Commerce Commission Termination Act ("ICCTA"). The City has filed a Petition to Intervene in this proceeding.

### **STATEMENT OF FACTS**

The Main Street Extension is designed to provide a much-needed north/south transportation corridor for the City of Jeffersonville. (Aug. 11, 2011 Lanz Aff., ¶ 14, Ex. A). The Main Street Extension will require an at-grade crossing over railroad tracks operated by L&I, which was approved by the Rail Office of INDOT in its January 18, 2011 and June 24, 2011 Orders. As the Rail Office noted, train operations on the L&I tracks consist of only 10 trains per week at an approximate speed of 10 mph. (Jan. 18, 2011 Rail Office Order, Ex. B). Pursuant to the Rail Office's Order, the City of Jeffersonville will bear the costs for the installation of gates, standard flashers, a bell, crossbuck signs, advance warning signs, pavement markings, stop lines, and illumination. (*Id.*).

L&I claims to be considering plans to develop a railroad marshaling and cargo transfer yard on its property. However, despite L&I's representations, made as early as March 18, 2011, L&I has not provided a single piece of evidence to demonstrate that its purported future plans are more than mere speculation, either in this action or the administrative proceeding before INDOT.<sup>1</sup> For example, L&I has not cited to any plans

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<sup>1</sup> These undocumented "future plans" arose just as the City of Jeffersonville requested approval of the Grade Crossing, while the proposal for the Main Street Extension has existed for over 14 years. Notably, the new tracks L&I claims to have planned are centered directly on the proposed crossing – extending a quarter mile on either side of the

or proposals for construction, contracts, or even letters of interest from potential customers. Notably, L&I has also failed to present any facts to demonstrate that the approved grade crossing would interfere with its current operations.

L&I has requested expedited handling of its Petition for Declaratory Order on the grounds that construction of the Main Street Extension has begun on property directly abutting L&I's property. Although the City does not oppose L&I's request for expedited handling, its claim regarding construction is untrue. The City has not performed any work on the Main Street Extension in several years, and any preliminary work that was performed several years ago did not involve the proposed Grade Crossing or its immediate vicinity. (Aug. 11, 2011 Lanz Aff., ¶ 16, Ex. A).

### **ARGUMENT**

INDOT's approval of the Grade Crossing is not preempted by federal law. As demonstrated below, the ICCTA does not preempt grade crossings such as the one INDOT approved in this instance.

#### **I. Approval of Grade Crossings Are Preempted by the ICCTA Only If They Would Unreasonably Burden or Interfere with Railroad Operations**

The Board has consistently made clear that not all state and local regulations that affect rail transportation are preempted by the ICCTA. *See, e.g., Providence and Worcester R.R. Co. – Petition for Declaratory Order*, STB Finance Docket No. 35393, 2011 WL 2076463, at \*3 (S.T.B. May 23, 2011); *Mid-America Locomotive and Car Repair, Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34599, 2005 WL 1326958, at \*3 (S.T.B. June 6, 2005). With respect to laws affecting rail crossings and condemnation of railroad property for rail crossings, the Board and the majority of courts

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crossing – despite the fact that L&I appears to have ample room to accommodate these new activities in adjacent areas that would avoid the crossing.

that have addressed this issue have held that such laws are preempted only if their application would unreasonably burden or interfere with rail operations following a sufficient factual demonstration.<sup>2</sup> See, e.g., *Norfolk Southern Ry. Co. & The Alabama Great Southern R.R. Co. – Petition for Declaratory Order*, STB Finance Docket No. 35196, 2010 WL 691256, at \*4 (S.T.B. Feb. 26, 2010); *Maumee & Western R.R. Corp. and RMW Ventures, LLC – Petition for Declaratory Order*, STB Finance Docket No. 34354, 2004 WL 359835, at \*2 (S.T.B. March 2, 2004); *Franks Investment Co. v. Union Pacific R.R. Co.*, 593 F.3d 404 (5th Cir. 2010); *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321 (5th Cir. 2008); *Union Pacific R.R. Co. v. La. Public Serv. Comm’n*, 722 F. Supp. 2d 699 (M.D. La. 2010); *City of Sachse v. Kansas City Southern*, 564 F. Supp. 2d 649, 656 (E.D. Tex. 2008); *Wolf v. Cent. Ore. & Pacific R.R., Inc.*, 216 P.3d 316 (Ore. Ct. App. 2009); *Home of Economy v. Burlington Northern Santa Fe R.R.*, 694 N.W.2d 840 (N.D. 2005). Whether a regulation unreasonably burdens or interferes with rail transportation is a fact-specific inquiry. See *Joint Petition for Declaratory Order – Boston & Maine Corp. and Town of Ayer*, STB Finance Docket No. 33971, 2001 WL 458685, at \*6 (S.T.B. April 30, 2001). L&I has failed to provide any such facts to support preemption in this instance.

The Board recently filed an amicus brief at the request of the Fifth Circuit in which it addressed the nature of its jurisdiction over railroad crossings generally. *Brief for Surface Transportation Board as Amicus Curiae, Franks Investment Co.*, 593 F.3d at 404, 2009 WL 6297302 (filed Apr. 15, 2009). The Board clarified that while its

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<sup>2</sup> Regulating the public safety of grade crossings has long been considered one of the traditional police powers reserved to states. See *Wheeling & Lake Erie Ry. Co. v. Penn. Public Utility Comm’n*, 778 A.2d 785, 791 (Pa. Cmwlth. 2001) (collecting cases).

jurisdiction extends to grade crossing disputes, this jurisdiction is not exclusive. . *Id.* at 5. The Board cited the legislative history of the ICCTA for the proposition that “states and localities retain their reserved police powers to protect the health and safety of their citizens, so long as their actions *do not unreasonably burden interstate commerce or interfere with railroad operations.*” *Id.* at 8-9 (emphasis added).

In its brief, the Board concluded that private grade crossing disputes are not categorically preempted by the ICCTA, but must undergo an as-applied preemption analysis. *Id.* at 11. The Board cited its explanation in a previous decision that “routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire crossings, sewer crossings, etc., are not preempted so long as they would not impede rail operations or pose undue safety risks.” *Id.* at 12 (citing *Maumee*, 2004 WL 359835, at \*2).

In the *Maumee* decision, the Board did not reach the issue of whether the city’s condemnation action for an easement for a grade crossing would be preempted under an as-applied analysis because it denied the railroad’s request for a declaratory order, concluding that the concerns raised by the railroad are “generalized and of the type that the courts are well-suited to address.” 2004 WL 359835 at \*2. Like the proposed grade crossing in this action, the City in *Maumee* sought a grade crossing as part of a planned two-lane street to connect a planned industrial park to the City. As the Board emphasized in *Maumee*, this type of at-grade crossing does not fall within the exclusive jurisdiction of the STB.

## **II. Grade Crossing Disputes Are Not Preempted by the ICCTA Unless a Sufficient Factual Demonstration of Unreasonable Interference Is Made**

In order for state regulation or action to be preempted by the ICCTA, specific facts must be presented to show that the regulation or action unreasonably interferes with railroad transportation. Several federal and state courts have found that the ICCTA does not preempt grade crossing disputes under an as-applied preemption analysis where the factual demonstration of unreasonable interference was not sufficient. *See, e.g., Franks Investment Co.*, 593 F.3d at 415; *Island Park, LLC v. CSX Transp.*, 559 F.3d 96 (2d Cir. 2009); *Dist. of Columbia v. 109,205.5 Square Feet of Land*, No. Civ.A 05-202, 2005 WL 975745 (D.D.C. April 21, 2005). For example, in *Franks Investment Company*, a property owner sought to keep open a private grade crossing based on an implied easement under state law. 534 F.3d 443 (5th Cir. 2008). The district court found the claim to be expressly preempted by the ICCTA, and a panel of the Fifth Circuit affirmed, holding that railroad crossings fit within the purview of “transportation by rail carriers.” 534 F.3d at 446. On rehearing en banc, the court reversed, finding that the claim was not preempted categorically or as applied. 593 F.3d at 415. The railroad had not presented any specific evidence that the crossings interfered with its operations, and the court characterized them as “typical crossings and a typical dispute” that is not preempted. *Id.*

Similarly, the Second Circuit held that an order of the New York State Department of Transportation to close a private rail crossing was not preempted by the ICCTA. *Island Park*, 559 F.3d at 105. In deciding that the regulation of rail crossings is not categorically preempted, the court explained that “[i]f we adopted a definition of rail transportation for pre-emption purposes that includes the movement of people and property *across* railroad tracks, then any entity – an automobile, bicycle or even a

pedestrian passing over the crossing – would arguably be beyond the reach of state regulatory authority,” a conclusion that it found untenable. *Id.* at 103. The court found the closure order to withstand the as-applied preemption analysis because it did not place any burden on the railroad. *Id.* at 106.

In another case, a court conducted an as-applied preemption analysis of the proposed condemnation of railroad property for a pedestrian and bicycle trail and found no unreasonable interference with railroad operations. *109,205.5 Square Feet of Land*, 2005 WL 975745 at \*4. The railroad argued that the taking would impede its access to its signal boxes and prevent railroad maintenance, but the District presented evidence that the railroad would still have vehicular access to its signal equipment and general accessibility for maintenance. *Id.* at \*3. The court also found that the District’s intended use would not pose an undue safety risk because the trail would maintain the required setback distance and the District would install security fencing between the trail and any active rail. *Id.* at \*4.

Although none of these cases present a factual scenario identical to the one at issue, they make clear that the approval of grade crossings is not preempted by the ICCTA unless a sufficient factual showing is made that the crossing would unreasonably burden or interfere with rail transportation. As demonstrated below, L&I has not made such a factual showing in this case.

### **III. L&I Has Not Made a Sufficient Factual Demonstration That the Approved Crossing Would Unreasonably Interfere with Railroad Operations**

L&I has failed to demonstrate that INDOT’s approval of the Grade Crossing creates an unreasonable burden on or interference with railroad transportation. Indeed, L&I has presented no real evidence to demonstrate such a burden. L&I’s statement in its



Petition for Declaratory Order that L&I is “considering actual plans” for a transload facility is unsupported and unsubstantiated. (Petition for Declaratory Order at 3). L&I has produced no plans for construction of any new facilities, no evidence of contracts or letters of intent from potential customers, and no other evidence that its “plans” are anything more than speculative, either in this proceeding or in the administrative proceeding before INDOT. L&I has had the opportunity to present evidence to demonstrate its plans during the grade crossing approval process, in both of its Petitions for Review before INDOT, and now in this proceeding. Despite the Rail Office’s admonition in its June 24, 2011 Order that L&I has not substantiated its claimed proposal for a transload facility with “plans, schedule or funding sources,” L&I still has not come forward with a single piece of evidence to support its claimed future plans. (June 24, 2011 Rail Office Order, Ex. C).

Not only has L&I failed to provide any factual support for its future plans, L&I’s blanket statements of some future intent with respect to a possible use of this property do not satisfy the requirement that a railroad must present specific evidence that the crossings interfere with its *presently-conducted* railroad operations. *See, e.g., Franks Investment Co.*, 593 F.3d at 415. The rail traffic on the tracks is minimal – less than two trains a day on average, at low speeds. (Jan. 18, 2011 Rail Office Order, Ex. B). In addition, the City is required to provide gates, flashers, a bell, crossbuck signs, advance warning signs, pavement markings, stop signs, and illumination. (*Id.*). Thus, the effect of the Grade Crossing on L&I’s current operations will be minimal, and no undue safety risks will be presented.

L&I has not demonstrated that the approved crossing would interfere with its current operations, but instead rests its opposition entirely on its undocumented "future plans" for the property. A railroad's future operations may be an appropriate factor in an as-applied preemption analysis, but only if the railroad presents specific evidence documenting that its proposed project is more than mere speculation or an abstract plan. L&I has not presented any evidence that would support a finding of preemption in this instance.

L&I also appears to argue that the fact that it has presented a conceptual, unsupported "alternative" to the location of the City's proposed road and Grade Crossing, as approved by INDOT, weighs in favor of a finding of preemption. (Petition for Declaratory Order at 4). However, as INDOT specifically noted, L&I has provided no engineering basis for this alternative. (June 24, 2011 Rail Office Order, Ex. C). L&I's convoluted proposed alternate route consists of multiple sharp turns, and would take traffic through an industrial park and around deep quarry pits filled with water. (Aug. 11, 2011 Lanz Aff., ¶ 15, Ex. A). Not only is "alternate" route not an efficient or appropriate north/south transportation corridor, it would not meet applicable design standards mandated by the American Association of State Highway and Transportation Officials ("AASHTO"). (*Id.*; Mar. 18, 2011 Lanz Aff. ¶ 16, Ex. A to Aug. 11, 2011 Lanz Aff., Ex. A). L&I has yet to put forward any additional information regarding its proposed alternative that would lead to a different conclusion.

### CONCLUSION

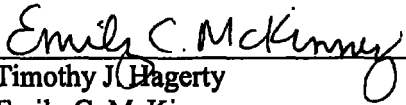
Federal preemption of state regulation involving grade crossings is not warranted unless a sufficient factual showing of unreasonable interference with railroad operations

has been made. Because L&I has failed to present any evidence to support its claim that INDOT's approval of the City's Grade Crossing Petition unreasonably interferes with its rail operations, a declaratory order is not appropriate in this instance.

Alternatively, in the event that the Board institutes a declaratory order proceeding, the City of Jeffersonville respectfully requests that the Board grant its request for intervention and establish an expedited briefing schedule.

WHEREFORE, the City of Jeffersonville respectfully requests that The Louisville & Indiana Railroad's Petition for Declaratory Order be denied or, alternatively, should the Board institute a declaratory order proceeding, that the Board grant the City of Jeffersonville's Petition to Intervene and establish an expedited briefing schedule and for all other relief as is proper.

Respectfully submitted,

  
\_\_\_\_\_  
Timothy J. Hagerty  
Emily C. McKinney

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*Attorneys for the City of Jeffersonville, IN*

**CERTIFICATE OF SERVICE**

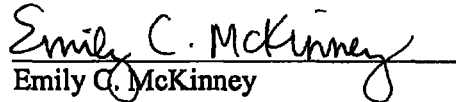
Service of the foregoing City of Jeffersonville's Response to Petition for Declaratory Order was made by placing a copy of the same into the United States Mail, first class postage prepaid, this 11th day of August, 2011, addressed to:

Mark H. Sidman  
Rose-Michelle Nardi  
Weiner Brodsky Sidman Kider PC  
1300 19th Street NW  
Fifth Floor  
Washington DC 20036-1609

John Secor  
President  
Louisville & Indiana Railroad  
500 Willinger Lane  
Jeffersonville, IN 47130

Gabe Paul  
Indiana Department of Transportation  
100 N. Senate Avenue  
Indiana Government Center North, Room 730  
Indianapolis, IN 46204

Darren Wilder  
City of Jeffersonville  
530 East Court Avenue  
Jeffersonville, IN 47130  
*Attorney for City of Jeffersonville, IN*

  
Emily C. McKinney

## EXHIBIT A

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 35536**

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**LOUISVILLE & INDIANA RAILROAD  
PETITION FOR DECLARATORY ORDER**

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**SECOND AFFIDAVIT OF JORGE I. LANZ, P.E.**

I, Jorge I. Lanz, P.E., affirm the truth of the following representations.

1. I am an adult of sound mind, competent to testify to all matters set forth in this Affidavit.
2. All facts asserted in this Affidavit are within my personal knowledge.
3. Attached hereto as Exhibit A is a true and accurate copy of an affidavit I signed on March 18, 2011 ("March 18, 2011 Affidavit"). It is my understanding that the March 18, 2011 Affidavit was previously offered in the matter of *Petition of the City of Jeffersonville, Clark County, Indiana, for the approval of a grade crossing on proposed road over mainline tracks owned by the Louisville & Indiana Railroad in Clark County, Indiana v. Louisville & Indiana Railroad et al.*, Indiana Department of Transportation Rail Office Docket No. DOT-RR-2086.
4. I am a principal at Jacobi, Toombs and Lanz, Inc. ("JTL") and joined JTL in 1977. My business address is 120 Bell Avenue, Clarksville, Indiana 47129.
5. JTL is an engineering firm that provides among other engineering services, civil site engineering services, including traffic engineering services.

6. I am a Professional Engineer, licensed in the State of Indiana with the license number 19583. I have been a licensed Professional Engineer in the State of Indiana continuously since 1981.

7. I graduated with a Bachelor of Science degree from the University of Louisville in 1977 and a Masters of Engineering degree from the University of Louisville in 1979. A true and accurate copy of my current resume is attached as Exhibit 1 to the March 18, 2011 Affidavit.

8. JTL has been retained by the City of Jeffersonville to perform engineering services associated with the Main Street Extension project including the at-grade crossing which is captioned above. JTL's services have included among other things, survey, design, and obtaining various regulatory agency permits for the Main Street Extension and the at-grade crossing at issue.

9. I was one of JTL's representatives for purposes of the work and services it performed on behalf of the City of Jeffersonville concerning the Main Street Extension and the grade crossing at issue.

10. In my capacity as a P.E. and in my position with JTL, I have experience in Traffic and Transportation Engineering.

11. In my position with JTL, I have reviewed and am familiar with documentation submitted by or on behalf of the City of Jeffersonville concerning the Main Street Extension and the at-grade crossing at issue.

12. At all relevant times, I have been retained by the City of Jeffersonville to serve as one of its engineers with respect to the Main Street Extension, including, among other things, all aspects related to the at-grade crossing at issue.



13. I have worked on numerous similar road design engineering projects in Indiana since becoming a licensed Professional Engineer.

14. The Main Street Extension is intended to establish a north-south route through an area of the City that currently has no effective north-south transportation corridor. This project is of vital importance to the City. The grade crossing over railroad tracks operated by L&I is a necessary part of the Main Street Extension.

15. Based upon my education, training and experience, it is my opinion that the proposed alternate route depicted by L&I, attached as Exhibit 2 to the March 18, 2011 Affidavit, would not meet the project purposes of the Main Street Extension. The proposed alternate route consists of multiple sharp turns, and would take traffic through an industrial park and around deep quarry pits filled with water. The alternate alignment proposed by L&I would connect to 4<sup>th</sup> Avenue, which dead-ends at Plank Road, negating the City's intention of creating a through corridor that will extend all the way to Market Street to the south, one block north of the Ohio River.

16. I have made periodic visits to the proposed location of the Main Street Extension during the course of the last five years, and the City has not performed any work on the Main Street Extension during that time.

17. To my knowledge, the preliminary work that was performed prior to 2006 did not involve the proposed grade crossing or its immediate vicinity.

I SWEAR AND AFFIRM UNDER THE PENALTIES OF PERJURY  
THAT THE FOREGOING STATEMENTS ARE TRUE.

Dated:

8/11/11

Jorge I. Lanz, P.E.

## EXHIBIT A

PETITION OF THE CITY OF  
 JEFFERSONVILLE, CLARK COUNTY,  
 INDIANA, for the approval of an  
 establishment of a grade crossing on proposed  
 road over mainline tracks owned by the  
 Louisville & Indiana Railroad in Clark  
 County, Indiana,  
  
 Petitioner,  
  
 v.  
  
 LOUISVILLE & INDIANA RAILROAD,  
 UTILITY CONSUMER COUNSELOR FOR  
 THE STATE OF INDIANA, JEFFERSON  
 PUBLIC WAREHOUSE, INC. AND CSX,  
 INC.,  
  
 Defendant.

**I, Jorge I. Lanz, P.E., affirm the truth of the following representations.**

1. I am an adult of sound mind, competent to testify to all matters set forth in this Affidavit.
2. All facts asserted in this Affidavit are within my personal knowledge.
3. I am a principal at Jacobi, Toombs and Lanz, Inc. ("JTL") and joined JTL in 1977. My business address is 120 Bell Avenue, Clarksville, Indiana 47129.
4. JTL is an engineering firm that provides among other engineering services, civil site engineering services, including traffic engineering services.
5. I am a Professional Engineer, licensed in the State of Indiana with the license number 19583. I have been a licensed Professional Engineer in the State of Indiana continuously since 1981.

6. I graduated with a Bachelor of Science degree from the University of Louisville in 1977 and a Masters of Engineering degree from the University of Louisville in 1979. A true and accurate copy of my current resume is attached hereto as Exhibit 1 and is incorporated by reference as if fully set forth herein.

7. JTL has been retained by the City of Jeffersonville to perform engineering services associated with the Main Street Extension project ("MSE") including the at-grade crossing which is captioned above. JTL's services have included among other things, survey, design, and obtaining various regulatory agency permits for the MSE project and the at-grade crossing at issue.

8. I was one of JTL's representatives for purposes of the work and services it performed on behalf of the City of Jeffersonville concerning the Main Street Extension and the grade crossing at issue.

9. In my capacity as a P.E. and in my position with JTL, I have experience in Traffic and Transportation Engineering.

10. In my position with JTL, I have reviewed and am familiar with documentation submitted by or on behalf of the City of Jeffersonville concerning the MSE project and the at-grade crossing at issue.

11. At all relevant times, I have been retained by the City of Jeffersonville to serve as one of its engineers with respect to the Main Street Extension Project, including, among other things, all aspects related to the at-grade crossing at issue.

12. The necessary regulatory agency permits to begin construction of the MSE project have been received by the City of Jeffersonville. These are the IDEM 401 Water Quality Certification and a Section 404 U.S. Army Corps of Engineers permit.

13. I have worked on numerous similar road design engineering projects in Indiana since becoming a licensed Professional Engineer.

14. Based upon my education, training and experience, it is my opinion that the Main Street Extension, as presently designed, meets applicable standards recommended by the American Association of State Highway Officials ("AASHTO") and pertinent requirements of the Indiana Department of Transportation ("INDOT").

15. I have reviewed the correspondence from Louisville and Indiana Railroad ("L&I") dated May 24, 2010 and directed to Mr. Michael D. Riley, Rail Section Manager, Indiana Department of Transportation, 100 North Senate Avenue, N955, Indianapolis, Indiana 46204-2220, and the L&I proposed diagram which purports to depict an alternate route for the Main Street Extension and grade crossing. Attached hereto as Exhibit 2 is a copy of the May 24, 2010 letter from L&I with the attached diagram.

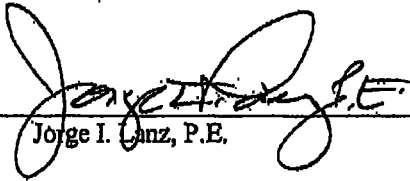
16. Based upon my education, training and experience, it is my opinion that the proposed alternate route depicted by L&I, which is attached as Exhibit 2, does not comply with applicable standards recommended by AASHTO and pertinent requirements of INDOT with respect to minimum curve radii for urban streets.

17. Based upon my education, training and experience, it is my opinion that the proposed alternate route depicted by L&I, which is attached as Exhibit 2 may require the City of Jeffersonville to fill additional federally protected wetlands to complete construction of the MSE.

18. The alternate alignment proposed by L&I would connect to 4<sup>th</sup> Avenue, which dead-ends at Plank Road, negating the City's intention of creating a through corridor that will extend all the way to Market Street to the south, one block north of the Ohio River.

I SWEAR AND AFFIRM UNDER THE PENALTIES OF PERJURY  
THAT THE FOREGOING STATEMENTS ARE TRUE.

Dated: MARCH 18, 2011

  
\_\_\_\_\_  
Jorge I. Lanz, P.E.

## EXHIBIT 1

Years with JTL: 32  
Years with other firms: 0

**Education**  
B.S. Civil Engineering, 1977  
Speed Scientific School  
University of Louisville

M.S. Civil Engineering, 1979  
Speed Scientific School  
University of Louisville

**Professional Affiliations**  
➤ Indiana Rural Water  
Association  
➤ Kentucky Society of  
Professional Engineers  
➤ National Society of  
Professional Engineers

IN PE License 60019583  
KY PE License 12503

*Mr. Lanz brings over 32 years of  
professional experience in many  
different areas including:*

- Construction Management and  
Supervision
- Strategic Planning and Design
- Storm/Sanitary Planning and  
Design
- Wastewater Treatment Process  
Rehabilitation
- Water Supply and Distribution

## **Jorge I. Lanz, P.E.** **President, Project Manager**

Mr. Lanz is President of Jacobi, Toombs and Lanz, Inc. Aside from his business-related responsibilities, he is a Project Manager on civil and environmental engineering projects undertaken by the firm. Professional responsibilities include engineering and planning studies, design, and construction supervision of airport, highways, bridge, stormwater, potable water and wastewater projects.

### ***Representative Project Experience:***

#### **Veteran's Parkway Road and Bridge Construction Jeffersonville and Clarksville, Indiana**

Mr. Lanz was an integral part of the development of this major arterial corridor which included a new interchange at Interstate-65. His guidance and involvement included, but was not limited to, route planning, political coordination with local, state and federal governments to design, negotiating Right-of-Way parcels and obtaining donations, funding applications and grant requests as well as construction engineering and inspection. Major project elements include the following:

- The main five-lane road from Giltner Lane in Clarksville across I-65 to Woerhle Road in Jeffersonville, a distance of approximately 1.5 miles.
- The connection to the new interchange constructed by INDOT.
- A new five-span bridge over US31 and the L&I Railroad.
- A major culvert over Lick Run Creek.
- Reconstruction of the approaches at Hamburg Pike.

The project was completed in 2005 at a construction cost of \$9.8M. Partial funding was obtained through Federal-Aid and also by the State Infrastructure Banking (SIB) loan in the State of Indiana.

**Mt. Tabor Road Reconstruction/New Albany, Indiana** - Mr. Lanz served as overall Project Manager during the reconstruction of this project. Scope included planning and design, Right-of-Way acquisition activities and construction engineering for this 1.0 mile of city street. The project was completed in 2007 and the cost of construction was \$3.0M, which was partially funded (80%) by Federal-Aid grant.

**Lewis and Clark Parkway Reconstruction/Clarksville, Indiana** - Mr. Lanz assisted with the fair and equitable negotiated settlement between the State of Indiana and the Town of Clarksville which enabled INDOT to relinquish this state road to the local government.



Payment was awarded to the city in the amount of \$1.8M and Tax Increment Financing (TIF) was made available to fund the project. The old rural style road was transformed into urban arterial with pedestrian facilities and new traffic signalization. JTL provided all survey, planning, design, Right-of-Way acquisition activities and construction observation. The project was completed in 2005 at a construction cost of \$8.0M.

**Middle Road Reconstruction /Clark County, Indiana** - Mr. Lanz served as overall Project Manager for the reconstruction of Middle Road, from Perrin Lane to just east of Port Road a distance of approximately 2.5 miles. Construction was completed in three (3) phases and utilized Federal Aid funds. Construction was completed in 2000 at a total cost of \$3.5M.

**Green Valley Road Reconstruction/New Albany, Indiana** - Mr. Lanz served as overall Project Manager for this road widening project which encompassed State Street to Hausfeldt Lane, approximately 2.5 miles. Under Mr. Lanz's management, JTL provided all survey, planning, design, Right-of-Way acquisition services and construction engineering. This project was completed in 1999 with 80% federal funding at a construction cost of \$4.75M.

In summary, Mr. Lanz has designed, managed and supervised the construction of approximately forty (40) road projects and approximately twenty-five (25) local and/or state bridge projects in Southern Indiana during his thirty-plus year career.

## EXHIBIT 2



GENERAL OFFICE  
500 WILLINGER LANE  
JEFFERSONVILLE IN 47130  
(812) 288-0940  
FAX (812) 288-4977

May 24, 2010

Mr. Michael D. Riley  
Rail Section Manager  
Indiana Department of Transportation  
100 North Senate Avenue, N955  
Indianapolis, IN 46204-2220

Re: City of Jeffersonville Crossing Petition

Dear Mr. Riley:

The purpose of this correspondence is to respond to the petition for a new at grade crossing in Jeffersonville over tracks owned and operated by the Louisville & Indiana Railroad. For the reasons cited below Louisville & Indiana Railroad cannot support and therefore opposes the construction of a new at grade crossing in Jeffersonville, IN.

The location of the proposed crossing bisects a parcel of property owned by the railroad that was formerly a rail yard known as Dutch Lane Yard. The property is the largest contiguous parcel of land adjacent to the railroad that is suitable for development in Clark County. L&I's future plans are to build three or more parallel tracks along the length of the Yard and operate a rail-served plastic transload facility at that location. However, the Yard would be severed by the installation of the proposed roadway. If the petition to install the crossing is granted and the proposed road is built, the utility and value of this parcel of land as a transload facility, or for any other rail purpose, would be greatly diminished. Moreover, the proposed road would raise serious safety concerns for railroad and motor carrier personnel who work in the Yard.

L&I has met with the City and shared our future plans and our opposition to the petition for a new crossing. We suggested an alternative crossing further east that would not have as great an impact on the proposed transload facility and would eliminate most of our safety concerns that we have with multiple tracks and access roadways being crossed by the proposed road.

In an effort to remove the railroad from the center of this situation and to eliminate our opposition to the road we also suggested a land swap with the city for a similar situated parcel of land contiguous with the railroad elsewhere in Clark County.

Failing the alternatives outlined above, we believe that it is clear that the Surface Transportation Board has exclusive and preemptive jurisdiction in matters involving railroad operations. There are several recent STB and court decisions that make clear that a taking of the type contemplated by the City of Jeffersonville is preempted by federal law. In our letter to you, dated May 21, 2010, we provided citations to several such decisions. We believe that these decisions govern this situation and request that any decision rendered by the Indiana Department of Transportation acknowledge and consider these cases. Please be aware that, if INDOT approves the crossing and

Mr. Michael D. Riley  
Indiana Department of Transportation  
Jeffersonville Crossing Petition  
May 24, 2010  
Page 2

City of Jeffersonville, IN seeks to condemn property in the former Dutch Lane Yard, L&I intends to take appropriate action in federal court and at the STB to stop any such taking.

If, after giving due consideration to L&I's objections and the relevant STB and court decisions, INDOT grants authority to the City to install the crossing L&I requests that the following conditions be placed on the Order:

1. That two railroad crossings in the City of Jeffersonville be closed at a minimum.
2. The on-going responsibility for maintaining the crossing is with the City in perpetuity.
3. Crossing protection shall be 12" LED signals on cantilevers at a minimum.
4. In the event that the railroad builds the transload yard in the next ten years, the City pays for the construction of the at-grade crossing for each of the said tracks crossing the new road and that appropriate crossing protection is installed as required at the sole expense of the city.

If you have any questions or concerns, please contact me at your convenience.

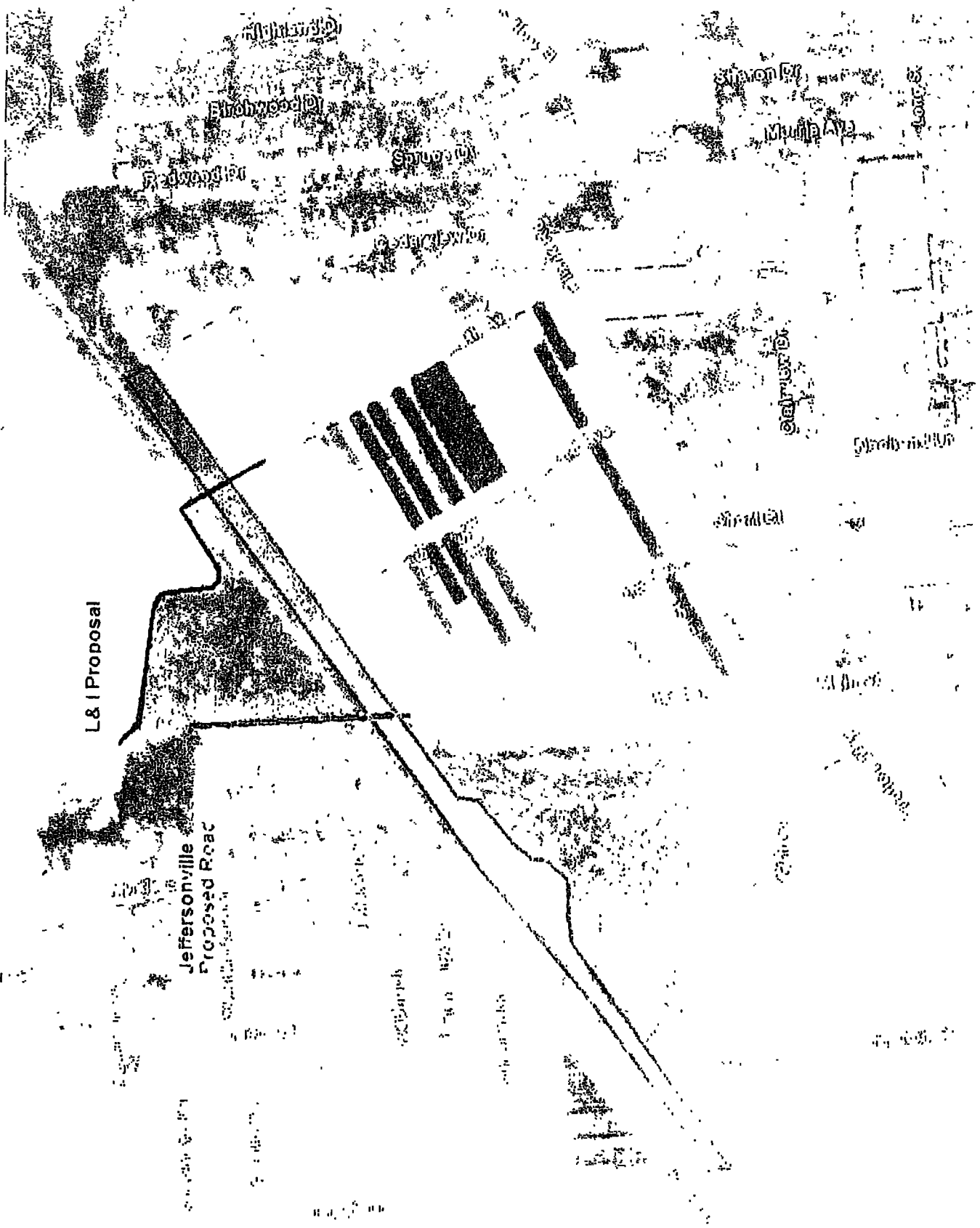
Sincerely,

*John K. Secor*

John K. Secor  
Louisville & Indiana Railroad

Mr. Michael D. Riley  
Indiana Department of Transportation  
Jeffersonville Crossing Petition  
May 24, 2010  
Page 2

Jeffersonville Crossing Petition Response 5-10



L&I Proposal

Jeffersonville  
Proposed Road

Highland Dr

Elmwood Dr

Elmwood Dr

Spruce Dr

Maple Dr

Maple Dr

Maple Dr

Maple Dr

Maple Dr

Maple Dr

Maple Dr

Maple Dr

Maple Dr

Maple Dr

Maple Dr

Maple Dr

Maple Dr

Maple Dr

Maple Dr

## EXHIBIT B

# INDIANA DEPARTMENT OF TRANSPORTATION

## Multi-modal Planning & Policy

### Rail Office

December 29, 2010

PETITION OF THE CITY OF JEFFERSONVILLE	)
CLARK COUNTY, INDIANA, FOR THE APPROVAL	) Docket No.: DOT-RR-2086
OF AN ESTABLISHMENT OF A GRADE CROSSING	)
ON PROPOSED ROAD OVER MAINLINE TRACKS	)
OWNED BY THE LOUISVILLE & INDIANA	)
RAILROAD IN CLARK COUNTY, INDIANA	)
	)
PETITIONER,	)
	)
and	)
	)
LOUISVILLE & INDIANA RAILROAD, UTILITY	)
CONSUMER COUNSELOR FOR THE STATE OF	)
INDIANA, JEFFERSONVILLE PUBLIC	)
WAREHOUSE INC. AND CSX INC.	)
	)
RESPONDENTS.	)

### RAIL OFFICE ORDER

#### Whereas:

On March 17, 2010 the City of Jeffersonville (Petitioner), Clark County, Indiana, respectfully petitioned the Indiana Department of Transportation Rail Office for approval of the establishment of a crossing at grade at the junction of the proposed road and the railway tracks of Louisville & Indiana Railroad.

On March 17, 2010 the Indiana Department of Transportation (INDOT), Rail Office notified parties of record the above captioned petition had been received.

On May 5, 2010 the INDOT Rail Office notified parties of record that an on site meeting was scheduled for May 18, 2010.

On May 18, 2010 an on site meeting was conducted. In attendance were representatives of:

Mike McGathey – INDOT Rail Office  
 Tom Dunbar – INDOT Seymour District  
 Bryan Glover – CSX  
 John Secor – Louisville & Indiana Railroad  
 Darren Wilder – Attorney – City of Jeffersonville  
 Jorge I. Lanz – P.E. – City of Jeffersonville  
 Tom Galligan – Mayor – City of Jeffersonville



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DOT-RR-2086

The proposed road will be under the jurisdiction of the City of Jeffersonville.

The proposed road will intersect railway tracks currently operated by Louisville & Indiana Railroad at a point of an extension of Main Street near America's Place.

Petitioner desires to construct the proposed road to provide a north-south route through the city of Jeffersonville.

Petitioner anticipates average daily vehicular traffic (ADT) is estimated at 6,900 vehicles per day with a design speed of 30MPH.

Petitioner proposes installing standard flashers, audible (bell), crossbucks, and advance warning signs and pavement markings.

Petitioner proposes installing a rubber crossing surface.

The proposed road will intersect the Louisville & Indiana tracks of 55 degrees tangent to the tracks.

The proposed road will intersect the Louisville & Indiana Railroad tracks with grades of 0.1% on the west and 0.6% on the east side, with no vertical curve.

Using the Federal Railroad Administration GX32 accident and fatal prediction calculation formulas the proposed crossing; with passive warning devices has a 0.020293 accident prediction and a 0.00287 fatal prediction; with standard flasher warning devices has a 0.006938 accident prediction and a 0.000098 fatal prediction; with gate warning devices has a 0.004501 accident prediction and a 0.00064 fatal prediction.

The proposed crossing is not in a Federal Railroad Administration designated quiet zone.

The proposed crossing is located in a light industrial area.

Motorist view sight at the proposed crossing will be in compliance with Indiana Code (IC) 8-6-7.6. Unobstructed View at Crossings – IC 8-6-7.6-1 – Distance of unobstructed view; exemptions – (b) A public crossing equipped with a train activated crossing gate is exempt from the requirements of subsection (a), if the railroad maintains an unobstructed view for at least two hundred fifty (250) feet in both directions along the railroad right-of-way.

Train operations consist of 10 trains per week at an approximate speed of 10 MPH.

Spur track serves Jeff Boat industries.

CSX owns the former (B&O) property to the north.

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DOT-RR-2086

**THEREFORE:**

*As a result of an investigation conducted by the Indiana Department of Transportation, Rail Office and in accordance with Indiana Code 4-21.5-3:*

**IT IS ORDERED:**

The Petition is approved based on the following:

The submitted construction plans.

Louisville & Indiana Railroad shall install gates, standard flashers (12 inch LED), one bell and crossbuck signs.

The City of Jeffersonville shall install advance warning signs, pavement markings, stop lines and illumination.

The City of Jeffersonville shall bear the cost to install gates, standard flashers (12 inch LED), a bell, crossbuck signs, advance warning signs, pavement markings, stop lines and illumination.

Louisville & Indiana Railroad shall install a rubber crossing surface.

City of Jeffersonville shall bear the cost to install a rubber crossing surface.

Concurrent with the opening of the proposed rail-highway intersection; the City of Jeffersonville shall close and barricade crossing: 535 305 C - Indiana Avenue.

City of Jeffersonville shall commence the crossing construction within eighteen (18) months of the date of this Order, unless an extension of time is requested and approved by INDOT.

City of Jeffersonville and Louisville & Indiana Railroad shall be responsible for compliance with all applicable state statutes and follow all specifications outlined in the Indiana MUTCD.

All items not addressed specifically in this Order shall be complied with as stated in the petition.

Petitioner shall remove brush and trees to provide the motorist with the unobstructed view pursuant to Indiana Code 8-6-7.6-1. Where the statutorily prescribed distance is 250 feet, compliance with I.C. 8-6-7.6-1 is determined by measuring from a vantage point in the center of the roadway 20 feet from the nearest rail and 3.5 feet above the roadway, to a point 250 feet down the tracks and 3 feet above the centerline of the nearest track (measured from top of rail). As provided by the statute, these views are subject only to terrain elevations or depressions, track curvature, or permanent improvements."

From:

To: 92886656

01/25/2011 11:28

#655 P.005/006

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December 29, 2010

INDOT, Rail Office Order

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Pursuant to 105 IAC 5-8-6 – written notice of compliance – Upon fulfillment of the provisions of the department's order, the petitioner shall notify the department in writing that all conditions have been complied with.

This Order is effective fifteen (15) days after it is served, unless a Petition for Review and a Petition for Stay of effectiveness are filed before the Order becomes effective, Indiana Code 4-21.5.3-7(f). The Petition for Review must state the facts required by Indiana Code 4-21.5.3.7, specifically:

The Petitioner is a person to whom the Order is specifically directed;  
The Petitioner is aggrieved or adversely affected by the Order; or  
The Petitioner is entitled to review under any law.

The Petition for Review must be sent the address below:

Rail Office, Manager  
Indiana Department of Transportation  
100 North Senate Avenue, Room N955  
Indianapolis, Indiana 46204

IT IS SO ORDERED

  
Michael D. Riley  
Manager - Rail Office  
Multi-modal Planning & Policy

From:

To: 92886656

01/25/2011 11:29

#655 P.006/006

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December 29, 2010

INDOT, Rail Office Order

DOT-RR-2086

Mr. David Stippler  
Indiana Utility Consumer Counselor  
115 W. Washington St., Suite 1500 South  
Indianapolis, IN 46204

Inter-Department Mail

Mr. Darren Wilder  
Attorney - Petitioner  
City of Jeffersonville  
530 E. Court Avenue  
Jeffersonville, IN 47130

Certified Mail

Mr. John Secor  
President  
Louisville & Indiana Railroad  
500 Willinger Lane  
Jeffersonville, IN 47130

Certified Mail

Mr. Bruce A. Hugon  
Resident Agent - CSX Transportation, Inc.  
c/o Stuart & Branigin LLP  
8888 Keystone Crossing  
Suite 640  
Indianapolis, IN 46240

Certified Mail

Mr. John Engleking  
Real Estate Services Manager  
Indiana Department of Transportation  
Seymour District  
185 Agrico Lane  
Seymour, IN 47274

Inter-Departmental Mail

Mr. Tom Dunbar  
Utility/Railroad Engineer  
Indiana Department of Transportation  
Seymour District  
185 Agrico Lane  
Seymour, IN 47274

Inter-Departmental Mail

File: 2086 Order

## EXHIBIT C

# INDIANA DEPARTMENT OF TRANSPORTATION

## Multi-Modal Planning & Policy

### Rail Office

PETITION OF THE CITY OF JEFFERSONVILLE )  
CLARK COUNTY, INDIANA, FOR THE APPROVAL ) Docket No.: DOT-RR-2086  
OF AN ESTABLISHMENT OF A GRADE CROSSING )  
ON PROPOSED ROAD OVER MAINLINE TRACKS )  
OWNED BY THE LOUISVILLE & INDIANA )  
RAILROAD IN CLARK COUNTY, INDIANA )  
 )  
PETITIONER, )  
 )  
 )  
LOUISVILLE & INDIANA RAILROAD, UTILITY )  
CONSUMER COUNSELOR FOR THE STATE OF )  
INDIANA, JEFFERSONVILLE PUBLIC )  
WAREHOUSE INC. AND CSX INC. )  
 )  
RESPONDENTS. )

### RAIL OFFICE ORDER

WHEREAS, On March 17, 2010, the City of Jeffersonville (Petitioner), Clark County, Indiana, respectfully petitioned the Indiana Department of Transportation Rail Office for approval of the establishment of a crossing at grade at the junction of the proposed road, an extension of Main St., near America's place and the railway tracks of the Louisville & Indiana Railroad (Railroad); and

WHEREAS, On January 18, 2011 the Rail Office issued an Order approving the petition; and

WHEREAS, On February 4, 2011 the Railroad timely filed a Petition for Review and Petition for Stay of Effectiveness. At issue in this matter is whether an alternate crossing is more appropriate as referenced in the Petition for Review; Section 11; and Section 19; and

WHEREAS, On February 22, 2011 the Indiana Department of Transportation, Rail Office filed a request for position statements and additional information to re-evaluate the merits of the original Petition and subsequent January 18, 2011 Rail Office Order. The additional information was due in the Rail Office by March 18, 2011; and

WHEREAS, the Rail Office received additional information from the Petitioner on March 18, 2011; and

WHEREAS, the Rail Office received additional information from Respondent on March 18, 2011.

NOW THEREFORE:

As a result of the review and investigation conducted by the Indiana Department of Transportation, the Rail Office has determined there is sufficient information and documentation that the location of the original crossing should remain as proposed. Additional information considered by INDOT included the following:

1. The Petitioner sufficiently described in the petition that the crossing will be safe for motorists.
2. The highest degree of safety warning devices will be installed by the Petitioner (i.e. – gates).
3. The motorist's view sight will exceed the statutory requirement of IC 8-6-7.6.
4. Single track – no simultaneous train movements.
5. Low volume train operations (10 trains/week) and speed (25mph).

The Respondent has submitted a conceptual alternative proposal but provides no engineering basis for the alternative alignment. The Rail Office cannot determine if will meet design or build specifications required by standards. The Respondent states the potential of a trans-load facility at the proposed crossing location but does not substantiate the proposal with plans, schedule or funding sources for such.

The Respondent has stated a jurisdictional issue between state and federal authorities in this crossing Petition proposal; However, the INDOT Rail Office only considered the Petition on its merits and is not qualified to make a legal determination upon the jurisdictional issue.

The Petition shall and is approved as originally proposed in the Order issued January 18, 2011 in accordance with IC8-6-7.7-3.4. Therefore, in accordance with IC 4-21.5-3:

IT IS ORDERED:

The January 18, 2011 Order approving the city of Jeffersonville's Petition is affirmed. Pertinent dates in the original Order will be based on the date of this Order.

This Order is effective fifteen (15) days after it is served, unless a Petition for Review and a Petition for Stay of effectiveness are filed before the Order becomes effective per IC 4-21.5.3-7(f).

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June 24, 2011

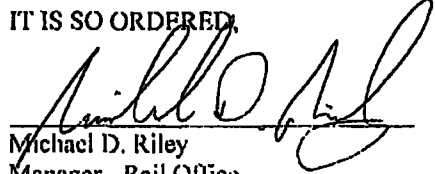
INDOT, Rail Office Order

DOT-RR-2086

The Petition for Review must be sent the address below:

Rail Office, Manager  
Indiana Department of Transportation  
100 North Senate Avenue, Room N955  
Indianapolis, Indiana 46204

IT IS SO ORDERED.



Michael D. Riley  
Manager - Rail Office  
Multi-modal Planning & Policy

Date:

6/24/11



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Mr. David Stippler  
Indiana Utility Consumer Counselor  
115 W. Washington St., Suite 1500 South  
Indianapolis, IN 46204

Inter-Department Mail

Mr. Darren Wilder  
Attorney – Petitioner  
City of Jeffersonville  
530 E. Court Avenue  
Jeffersonville, IN 47130

Certified Mail

Mr. John Secor  
President  
Louisville & Indiana Railroad  
Willinger Lane  
Jeffersonville, IN 47130

Certified Mail

Mr. Bruce A. Hugon  
Resident Agent - CSX Transportation, Inc.  
c/o Stuart & Branigin LLP  
8 Keystone Crossing  
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Indianapolis, IN 46240

Certified Mail

Ms. Clare E. Gorman  
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Nisen & Elliot  
200 West Adams Street  
Suite 2500  
Chicago, IL 60606

Certified Mail

Ms. Carrie G. Doehrmann  
Attorney – City of Jeffersonville  
201 N. Illinois Street  
Suite 1900  
Indianapolis, IN 46244-0961

Certified Mail

Mr. John Engleking  
Real Estate Services Manager  
Indiana Department of Transportation  
Seymour District  
185 Agrico Lane  
Seymour, IN 47274

Inter-Departmental Mail

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Mr. Tom Dunbar  
Utility/Railroad Engineer  
Indiana Department of Transportation  
Seymour District  
185 Agrico Lane  
Seymour, IN 47274

Inter-Departmental Mail

Re: 2086 Order